MM 94-150

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications and Information
Washington, D.C. 20230

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Federal Communications Commission
Office of Secretary

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150.

Dear Chairman Hundt:

I am writing to offer the views of the National Telecommunications and Information Administration (NTIA) on the issues raised in the above-captioned rulemakings, which propose several changes in the Commission's local television ownership rules.[1/] Some of the proposed modifications would relax existing constraints on the number of broadcast stations that an entity may own within a geographic market.[2/] Others would alter so-called attribution rules, which determine whether ownership actually exists.

Changes in Current Ownership Limits

NTIA urges the Commission not to relax the local television ownership rules without first assessing the effects of market changes already underway on competition and diversity in the broadcast television marketplace. The rule changes contemplated in this proceeding, if implemented, would continue the liberalization of the Commission's ownership rules in recent

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1/ Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making, MM Docket No. 91-221, FCC 96-438 (rel. Nov. 7, 1996) (hereinafter Second Further Notice); Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rule Making, MM Docket No. 94-150, FCC 96-436 (rel. Nov. 7, 1996) (hereinafter Further Notice).

2/ Specifically, the Commission is considering expanding its duopoly rule so as to allow a firm or individual to own two UHF television stations in the same geographic market. Second Further Notice ¶¶ 30, 33, 40. The Commission is also considering possible changes to the presumptive waiver of the one-to-a-market rule, beyond the statutory requirement that it be expanded to the top 50 markets. Id. ¶¶ 67-75.

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years. Previous changes to these rules have already profoundly affected the ownership structure of television and radio broadcasting.[3/] That is of great consequence to the American public because, as the Supreme Court has recognized, "broadcasting is demonstrably a principal source of information for a great part of the Nation's population."[4/]

Loosening the television local ownership rules can be expected to increase concentration in the local television marketplace. That has been the result of similar changes in other ownership limits.[5/] Increased concentration, in turn, threatens both competition and diversity in that marketplace. The Supreme Court has recently reaffirmed that "promoting the widespread dissemination of information from a multiplicity of sources, and . . . promoting fair competition in the market for television programming" are both important government interests that can justify regulation of media interests.[6/] Promotion of diversity, in particular, has been the distinguishing feature of media regulation in this country for more than six decades; it is founded on the bedrock First Amendment principle that "the widest possible dissemination of information . . . is essential to the welfare of the public."[7/] The need to protect competition and diversity through effective ownership rules continues, despite the continual expansion of media outlets. After all, a proliferation of outlets will be worth little if regulatory changes permit them to be held in fewer and fewer hands.

Recent developments make any further changes to the local television ownership limits troubling at this time. First, the Commission has not yet had time to evaluate the impact of recently-implemented changes in the ownership rules for radio and television. Changes in the national multiple ownership rules for

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3/ For a catalogue of some of the more prominent of those changes, see Comments of Media Access Project, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, at 5 (filed Feb. 7, 1997).

4/ Turner Broadcasting System, Inc. v. FCC, 65 U.S.L.W. 4209, 4212 (U.S. Mar. 31, 1997) (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994) and United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968)).

5/ See notes 9-15 infra and accompanying text.

6/ Turner Broadcasting System, Inc. v. FCC, 65 U.S.L.W. 4209, 4212 (U.S. Mar. 31, 1997) (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. at 662).

7/ Associated Press v. United States, 326 U.S. 1, 20 (1945).

television and radio and local ownership rules for radio have created a bazaar in which licenses are traded at a dizzying pace. The Department of Justice reports, for example, that there have been more than 1,000 radio mergers since the Telecommunications Act of 1996 liberalized the radio ownership rules in early 1996.[8/]

The frenetic buying and selling of stations has steadily increased ownership concentration. In 1987, for example, the largest television group owner -- Capital Cities/ABC -- held eight stations that reached approximately 24 percent of the national television audience.[9/] Nine years later, the largest group owner -- Fox Broadcasting -- owned 22 stations serving approximately 35 percent of the nation's audience.[10/] During that same period, the average number of television stations owned by the ten largest group owners doubled from seven to fourteen and their national audience reach increased more than 40 percent from 15.85 percent to 22.28 percent.[11/]

8/ Remarks of Joel I. Klein, Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, ANA Hotel, Washington, D.C. (Feb. 19, 1997) (transcript of speech available from U.S. Dep't of Justice). Section 310(d) bars the sale or transfer of any broadcast license unless the Commission first determines "that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d). The 1996 Act left that fundamental requirement intact, even as it changed many other aspects of broadcast regulation. NTIA believes that the Commission's public interest review of a license transfer should be streamlined in most cases if the acquisition does not exceed applicable ownership limits. In some cases, however, an acquisition may raise sufficient competition, diversity, or other relevant concerns that a more searching public interest review is warranted.

9/ "Television's Top 20," Broadcasting, Aug. 31, 1987, at 33. Walt Disney Company acquired Capital Cities/ABC in 1995 for $18.5 billion. Don West, "The Dawning of Megamedia: Broadcasting's $25 Billion Week," Broadcasting & Cable, Aug. 7, 1995, at 4. Disney now owns 10 television stations that reach about 24 percent of America's television households. Elizabeth A. Rathbun and Cynthia Littleton, "Murdoch claims New World," Broadcasting & Cable, July 22, 1996, at 6 (hereinafter "Murdoch claims New World").

10/ "Murdoch claims New World," supra note 9, at 6.

11/ NTIA calculations based on data presented in sources cited supra note 9. We recognize that relaxation of the national multiple ownership rules for television may have reduced the (continued...)

A similar situation prevails in the radio marketplace, except that because the Commission's radio rules permit significant multiple ownership locally as well as nationally, there is growing concentration in local markets as well. Thus, in New York City, the nation's number one market, Westinghouse now owns the only two all-news stations.[12/] In Washington, D.C., the eighth largest market, four firms will soon hold 18 of the 22 top-rated commercial stations.[13/] Three companies own or operate 14 of the 30 stations in Louisville, KY, the 55th rated market, including seven of the top ten ranked by both audience share and revenue.[14/] Chancellor Media now controls at least 27 percent of the radio advertising market in five of the nation's ten largest markets.[15/] This pattern in local radio ownership is likely a harbinger of concentration levels to come in local television markets if the Commission proceeds with its proposals to relax local ownership rules.

A second factor that counsels against further relaxation of the television ownership rules at this time is the advent of digital television (DTV). The Commission has decided to issue a second 6 MHz channel for development of DTV and has limited those licenses to existing television licensees.[16/] As a consequence, a change in the ownership rules would permit (at least for some

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11/ (...continued from preceding page)
costs of forming new programming networks, because it arguably reduces the number of affiliation agreements that a prospective network must negotiate in order to secure a national audience reach. It remains true, nevertheless, that the Fox network was able to build and to thrive under more restrictive multiple ownership rules than exist today. Given that, it cannot be said that further loosening of the ownership rules is needed to foster the growth of additional networks.

12/ Neil Hickey, "So Big," Columbia Journalism Rev., Jan./Feb. 1997, at 23, 26.

13/ Marc Fisher, "3 More Area Radio Stations Change Hands: Sales Will Add to Conglomerate Trend," Wash. Post, Apr. 15, 1997, at D1, D9.

14/ Patrick Howington, "City's Radio Landscape Changing," The Louisville Courier-Journal, Nov. 3, 1996, at 1E.

15/ Pradnya Joshi, "Radio Daze: Rapid Ownership Changes Bring New Industry Giant to Long Island," Newsday, Mar. 3, 1997.

16/ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order, MM Docket No. 87-268, FCC 97-115 (rel. Apr. 21, 1997) (hereinafter Sixth Report and Order). See also 47 U.S.C. § 336(a)(1).

period of years) accumulation not only of conventional television broadcast licenses, but their companion DTV licenses as well. Perhaps more importantly, deployment of DTV offers the exciting prospect of multiplying the number of broadcast outlets, because digital encoding and transmission technology permits the transmission of multiple standard definition television programs over a single 6 MHz DTV channel.[17/] Those diversity opportunities may be lost, however, if further dilution of the Commission's ownership rules allows increased concentration of programming control in the marketplace.

The final consideration that weighs against liberalization of the local ownership rules is the probable consequences of that action for minorities and minority broadcasters. To the extent that relaxation of the ownership rules increases demand for broadcast properties -- and this has been the case historically -- the principal beneficiaries will be those with sufficient capital to finance acquisition of increasingly expensive properties.[18/] Studies by NTIA and others indicate that access to capital is a significant problem for minorities and is a principal reason for the dearth of minority ownership of television stations in the United States.[19/] Thus, a change in current local ownership limitations may reduce opportunities for minorities below the meager levels that already exist.

17/ See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Further Notice of Proposed Rule Making, 11 FCC Rcd 10968, 10971, ¶ 5 (1996).

18/ The average price of a broadcast television station in 1996 was about $106 million, some 150 percent higher than the average price only a year earlier. NTIA calculation based on broadcast sales data presented in Donna Petrozzello, "Trading Market Explodes," Broadcasting & Cable, Feb. 3, 1997, at 19.

19/ See, e.g., U.S. Dep't of Commerce, National Telecommunications and Information Administration, Minority Commercial Broadcast Ownership in the United States (Apr. 1996) (hereinafter Minority Ownership Report); U.S. Dep't of Commerce, National Telecommunications and Information Administration, Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries (Apr. 1995) (hereinafter Telecap Report). NTIA found that minorities are less likely than their white counterparts to receive financing from traditional capital sources such as banks, even though there are no differences in education, business experience, or other factors. Telecap Report at 57. We also found that there are more radio stations owned by African-Americans in areas where there are also established Black-owned banks. Minority Ownership Report at 14-15.

A lessening in minority ownership would surely have adverse consequences on diversity. A recent study conducted at the California Institute of Technology based on data from more than 7,000 radio stations found a positive relationship between minority broadcast ownership and the supply of minority-oriented programming.[20/] Moreover, the study also found that a minority-owner would most likely provide programming of interest to his or her own minority group.

For all of these reasons, NTIA strongly recommends against any action that would relax the Commission's current limitations on local television ownership. As the Commission well knows, proposals to change those limitations must be evaluated against the Commission's statutory obligation to allocate broadcast licenses in a way that serves the "public convenience, interest or necessity," and that ensures a "fair, efficient, and equitable distribution" of radio licenses.[21/] Before relaxing its ownership rules any further, the Commission should first assess completely the effects that recent rule changes have had upon competition and diversity in the broadcast marketplace. Additionally, the Commission should allow a sufficient amount of time to elapse before it evaluates the effects of its DTV allocation policy on those vital government interests. Finally, the Commission must thoroughly consider the ramifications of an additional change in its ownership rules on opportunities for minorities to obtain and operate broadcast licenses.

Thus, the Commission should not adopt its proposal to change the definition of a television station's market from the area within its Grade B contour to the territory covered by the station's Designated Market Area (DMA), as determined by A.C. Nielsen.[22/] NTIA examined the implications of this proposed shift in three states: Colorado, Florida and North Carolina. We found that the Commission's proposal would permit 37 more UHF/VHF or UHF/UHF combinations than would be allowed under the Grade B rule.[23/] These results indicate that a substantial amount of

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20/ Jeffrey Dubin and Matthew Spitzer, Division of Humanities and Social Sciences, California Inst. of Technology, "Testing Minority Preferences in Broadcasting," at 19 (Social Science Working Paper 856, July 1993).

21/ 47 U.S.C. § 307(a),(b).

22/ Under the Commission's proposal, stations in different DMAs could come under common ownership, unless their Grade A contours overlap. Second Further Notice ¶¶ 14-25.

23/ Calculation based on cross-tabulations of Grade B overlaps generated by the NTIA Institute for Telecommunication Sciences (continued...)

additional concentration could occur within these states if the prevailing duopoly rule were applied to a DMA/Grade A contour regime.

The Commission should also refrain from modifying the existing duopoly rule to permit mergers between UHF stations in the same market. Parties advocating this approach base their claims for relief on alleged disadvantages that UHF stations face in the marketplace.[24] Deployment of DTV, however, may substantially mitigate those disadvantages, if not eliminate them entirely. It is likely, for example, that the Commission's designated power limitations for DTV licenses will ameliorate the technical handicap that has plagued analog UHF broadcasters vis-a-vis their VHF counterparts.[25] Further, the multichannel capabilities of digital transmission should enhance UHF licensees' ability to compete in the video marketplace. At a minimum, then, the Commission should defer action on the duopoly rule until DTV is deployed and the Commission has evaluated the marketplace effects for UHF licensees.[26] Meanwhile, during the DTV transition period, UHF licensees will have the security of knowing that the Supreme Court has upheld the constitutionality of the must-carry rules.[27] This decision has already provided a green light to a number of UHF station group owners now planning to launch new networks.[28]

NTIA would not, however, object to extension of the Commission's waiver policy concerning the "one-to-a-market" rule

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23/ (...continued from preceding page) with the A.C. Nielsen DMA Market Atlas published in Broadcasting & Cable Yearbook 1996, Vol. 1, at C-153 - C-236 (1996).

24/ See Second Further Notice ¶ 40 (citing "small audience share or limited area of signal coverage").

25/ See Sixth Report and Order ¶ 30.

26/ The Commission could grant waivers of the duopoly rule to permit mergers of same market UHF stations that involve a "failed" station, as currently defined by the Commission's rules. See Second Further Notice ¶ 41; 47 C.F.R. § 73.3555, note 7(2) (1996).

27/ Turner Broadcasting System, Inc. v. FCC, 65 U.S.L.W. 4209 (U.S. Mar. 31, 1997).

28/ Jon LaFayette and Mike Galetto, "This Bud's party was for must-carry ruling: Launch pad for Paxon, Diller," Electronic Media, Apr. 7, 1997, at 1A.

to markets below the top-50.[29] Under that policy, the Commission would presume that a waiver is appropriate if the requesting party can show that, after the transaction is completed, there will remain at least 30 independent broadcast voices in the market affected. This latter requirement provides assurances that extension of the current waiver policy to all television markets will not greatly exacerbate concentration in smaller markets, which probably lack sufficient outlets to justify waivers of the one-to-a-market rule. NTIA would strongly object, however, to any reduction in the threshold number of independent voices required, or any change in the requirement that those voices be terrestrial broadcast in nature (as opposed to satellite, cable television, newspapers, or other media).

Changes in Ownership Attribution Rules

Although NTIA believes that it would be, at best, premature for the Commission to relax further its ownership limits, we applaud the Commission's efforts to reform its ownership attribution rules. In a fundamental sense, attribution rules are even more important than ownership limits, because they define the confines of those limits. We therefore agree with the Commission that its attribution rules "must function effectively and accurately to identify all interests that are relevant to the underlying purposes of the . . . ownership rules and that should therefore be counted in applying those rules."[30] The fundamental purpose of those rules, moreover, is to "identif[y] with reliable accuracy those interests that convey to their holders a realistic potential to affect the programming decisions of licensees."[31] The proposals set forth in the Further Notice reflect the common sense understanding that there are many ways to influence the operations of a broadcast licensee without purchasing voting stock or serving as an officer or director.

Debt or Equity Plus

Under this approach, the Commission would attribute an otherwise unattributable debt or equity interest if (1) that holding exceeds a certain threshold (e.g., 33 percent) and (2) the holder also has "certain other significant interests in or relationships to a licensee or other media outlet subject to the cross-ownership rules that could result in the ability to

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29/ See Second Further Notice ¶¶ 66-72.

30/ Further Notice ¶ 7.

31/ Attribution of Ownership Interests, 97 FCC 2d 997, 1005 (1984).

exercise significant influence."[32] This proposal has some appeal because it recognizes that, in some instances, creditors may have the same ability to influence a broadcast licensee as voting stockholders and should therefore be accorded the same treatment for ownership purposes. While the proposal is an improvement over the current attribution rules, the Commission should also consider further refinements so that all relationships providing the ability to exercise significant influence are recognized and attributed.

In NTIA's view, the main shortcoming of the proposed change is that it defines the "interests" or "relationships" that constitute the "plus" of the debt or equity plus formula in terms of the entity holding the interest or relationship, rather than the nature of the interest or relationship itself. Specifically, the Commission appears inclined to attribute only above-the-threshold interests held by certain program suppliers or same market media entities.[33] The Commission is inclined to this view, in part, to "afford[] ease of administrative processing and reasonable certainty to regulatees in planning their transactions."[34]

NTIA recognizes that any attribution rule must not be administratively difficult for the Commission to implement, nor so vague or complex that it does not provide adequate and clear-cut guidance for industry. That being said, it should not be difficult for the Commission to identify with sufficient specificity a set of interests or relationships that would enable an investor to exert influence over a broadcast licensee, even if that investor lacks voting control. Viacom suggests three interests that should transform an investor into an owner: (1) participating in the programming of a licensee; (2) influencing the choice of personnel who make programming decisions; and (3)

32/ Further Notice ¶ 12.

33/ Id. The Commission apparently focuses on those two categories of investors because they have the "incentive and ability . . . to exert influence [over the licensee] such that [their] interest may implicate diversity and competition concerns." Id. ¶ 14. The Commission could reasonably assume, however, that any entity has an incentive to exert influence over a licensee in which the entity has made an investment -- whether to enhance the value of that investment or simply to protect it. The relevant question is whether the entity has the ability to translate its desires into action. Whether that ability exists depends on the characteristics of the investment and not the identity of the investor.

34/ Id. ¶ 13.

affecting the licensee's budget.[35] Other examples can easily be found, such as the power of a competitor who is also a nonvoting stock holder or creditor to limit the licensee's ability to incur debt, sell assets, or enter into strategic joint ventures without the investor's approval.[36]

NTIA therefore urges the Commission to reformulate the "plus" of its debt or equity plus formula, by enumerating a list of interests or relationships that will be presumed attributable, regardless of the size of the investment concerned or the nature of the investor.[37] The Commission by rulemaking could add to that list as experience demonstrates other financial or business arrangements that allow investors to influence or to control a broadcast licensee's operations. On the other hand, if a listed interest or relationship is not present, the Commission should allow fairly substantial investments without attribution. A reasonable limit for debt investment, for example, would be the 20 percent threshold that the Commission has proposed for passive equity investments.[38]

35/ Comments of Viacom, Inc., Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, at 7 (filed Feb. 7, 1997).

36/ See Comments of Department of Justice in Ex Parte Letter from Joel I. Klein, Acting Ass't Att'y Gen., Antitrust Div., to FCC Chairman Reed Hundt, at 12-14 (filed May 8, 1997) (in reference to MM Docket Nos. 91-221, 87-7, 94-150, 95-21, and 87-154).

37/ By so doing, the Commission would not, of course, eliminate case-by-case consideration of some attribution issues. But, as the Commission concedes, neither would debt or equity plus. Further Notice ¶ 13 (because that formula could "miss[] some situations that might be of concern," Commission reserves "the right to address extraordinary cases on an ad hoc basis and in a manner consistent with the public interest").

38/ Id. ¶ 36. NTIA is concerned about the Commission's proposal to raise the attribution limit for active investors from 5 percent to 10 percent. Id. A Commission staff study suggests that the change "would decrease the number of currently-attributable owners by approximately one-third." Id. ¶ 37. Furthermore, the Commission lacks "specific, empirical evidence" that raising the current benchmark would serve the public interest. Id. ¶ 36. NTIA therefore recommends that the Commission should not raise the attribution rule for active investors unless it can determine with confidence that stock ownership of less than 10 percent in a licensee with no majority stockholder does not convey an ability to control or to influence the licensee's operations.

Local Marketing Agreements (LMAs)

NTIA also supports the Commission's plan to attribute LMAs involving television stations, as it does with brokerage agreements affecting radio stations.39/ We are concerned, however, that the Commission is not in a position to promulgate a firm LMA attribution rule at this time because it lacks basic and systematic evidence about the prevalence of television LMAs and their effect on the marketplace. Although applying the radio rule (which attributes ownership when the brokered time exceeds 15 percent of the licensee's broadcast schedule) to television would be an acceptable first step, the radio and television markets are likely to be sufficiently different that grafting the 15 percent radio rule onto the television marketplace should only be an interim measure. The Commission should conduct a thorough survey of television LMAs as a prelude to establishing a final rule. Finally, any LMA concluded before the November 7, 1996 release date of the Further Notice should be reviewed before allowing it to continue until the end of its current term.

Thank you for your consideration of these views.

Sincerely,

Larry Irving

Larry Irving

cc: Commissioner James H. Quello
Commissioner Rachelle B. Chong
Commissioner Susan Ness

39/ Any attribution rule should cover all holders of such brokered interests, not only same market media entities and program suppliers to brokered licensees.